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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re J.A. et al., Persons Coming
Under the Juvenile Court Law.

B289727
(Los Angeles County
Super. Ct. No. DK10822)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

S.E.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los
Angeles County, Natalie P. Stone, Judge. Affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Acting Assistant County Counsel, Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

S.E. (mother) appeals from the findings and order terminating her parental rights under Welfare and Institutions Code section 366.26.¹ Mother² contends the court erred in finding inapplicable the parental relationship exception to termination of parental rights under section 366.26, subdivision (c)(1)(B)(i). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother has two daughters, but this appeal only involves her younger daughter, J.A., who was born in October 2013.

Initial dependency proceedings

In April 2015, the Los Angeles County Department of Children and Family Services (Department) detained J.A.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Father is not a party to this appeal.

from mother's custody based on mother's drug abuse. J.A., who was 18 months old, was placed with her maternal grandmother. Mother tested positive for alcohol in late May, and she only visited J.A. sporadically. Maternal grandmother expressed frustration at mother's disinterest in visiting J.A., and opined that mother was using the placement as "free babysitting" so she could continue to use drugs.

In August 2015, the court sustained a petition allegation that mother has a history of drug use and is a current user of methamphetamine, marijuana, and alcohol, making her incapable of caring for her children. It also sustained an allegation that mother placed the children in a dangerous home environment, where a drug pipe was found in J.A.'s crib, alcohol bottles were within the children's reach, J.A. was observed with a cigarette in her mouth, and J.A.'s older sibling found methamphetamine in mother's car. The court ordered drug treatment and drug testing for mother and continued monitored visitation for J.A.

Later in 2015, J.A.'s placement was changed from maternal grandmother to a foster family. Initially in her new placement, J.A. constantly needed to be redirected and, if she got upset, she would spit at or hit others. The foster mother reported that mother's two-hour weekly monitored visits with J.A. went generally well and mother was fully engaged with J.A. Between August and December 2015, mother had three negative drug tests and four no-shows, and she was just starting to participate in reunification services.

By March 2016, mother had enrolled in an outpatient drug and alcohol counseling program, and her drug and alcohol tests were consistently negative. The Department recommended continuing reunification services. At the six-month review hearing in March 2016, the court ordered continued reunification services, and liberalized mother's visitation to unmonitored public visits as long as she continued testing.

Beginning April 2016, mother began twice-weekly, eight-hour visits with J.A., which the foster parents reported were going well. J.A. was bonded to mother and happy to see her. Visits went well in late March and most of April, but mother was an hour late to drop J.A. off after one visit in late April, and appeared disheveled, emotional, and confused at the end of a visit in early May. Also, a social services worker called the Department on March 31, 2016 to report that mother was applying for aid, but appeared to be high or under the influence. Mother failed to show for two drug tests in April 2016, and dropped out of her drug treatment program in June after refusing to test for drug or alcohol use.

In June 2016, mother was arrested for driving under the influence (DUI). Mother's visits were restricted to monitored visits, based on her failure to drug test and on her DUI arrest. She cancelled her visits with J.A. in June and missed one visit in July. At a July hearing, the court ordered mother to undergo weekly drug testing with the county, clarifying that drug testing through her drug

treatment program would not meet the court's requirements. Later that same month, J.A. made a smooth transition to a new foster family, because her former foster family was moving out of the area. The Department's report observed that J.A. "generally gets along with everyone."

By August 2016, mother intended to enroll in an inpatient rehabilitation program, but had not provided proof of enrollment to the Department. Foster mother facilitated a 2-hour visit between mother and J.A. at a park on August 13, 2016. Mother did not show for a scheduled visit on August 15, 2016.

In October 2016, mother enrolled in an inpatient drug treatment program. Her initial drug test at the program was presumptively positive for methamphetamine, amphetamines, and marijuana. The following two weeks, mother tested negative for drugs and alcohol. Mother left the program after two weeks; she had been put on a behavior program after being accused of not following the rules, sneaking out, and drinking alcohol. Mother claimed the staff and other residents were targeting her because she had not been at the program very long. In November 2016, mother did not appear for drug tests five times, the first two times because of issues with her photo identification, and once because she was unaware of call-in new procedures for random testing. Twice, mother gave no explanation for not testing. The Department reports provide minimal information about mother's visits with J.A. in the fall of 2016. Mother had two monitored visits in August, and in

September, she was contacting J.A. by phone. The Department reported mother was aware she could have monitored visits on Wednesdays so long as she confirmed the day before, but she had not been doing so. Instead, mother would try to arrange visits on different days with very little notice.

Mother's reunification services terminated

At the 18-month review hearing in December 2016, the court terminated mother's reunification services and scheduled a hearing under section 366.26 for permanency planning. J.A.'s foster parents already had an approved adoption home study, but they needed an update specific to J.A. They were eager and excited about adopting J.A.

From December 2016 to March 2017, mother had monitored visits with J.A. in a monitored, neutral setting, with no issues of note. The Department transported mother to an inpatient drug program for readmittance in April 2017, but she was discharged less than a month later after testing positive for alcohol.

At a progress hearing in June 2017, the court ordered the Department to explore the possibility of overnight visits between J.A. and her teenage older sibling. The court also ordered the Department to speak to the foster parents about the possibility of an open adoption. The foster parents did not want to pursue an open adoption, noting that J.A.'s older sibling was inconsistent with phone calls and visits. They

also said that in the past, mother has been verbally aggressive and possibly intoxicated. The foster parents did not think continued contact was best for J.A., as she was often very quiet after visits with her mother or sibling, as if she was confused but lacked the words to express it.

In August 2017, the court granted a section 388 petition filed by J.A.'s teenage sibling seeking to participate in the section 366.26 hearing to address the sibling bond exception to termination of parental rights.

Mother had four no-shows and one negative test in August 2017, the same month she enrolled in a residential drug treatment program. In documentation supporting her section 388 petition, mother gave a list of dates she tested for the Department from July through September 2017, also noting that she was testing through her residential treatment program. She claimed that for certain dates, she had appeared at the testing site, but was told she was not on the list.

In October 2017, mother filed a section 388 petition seeking to have J.A. placed in her care at a residential program or to have reunification services reinstated, with overnight visits. Mother had been in residential treatment since August 2017, and submitted a letter from the program dated September 29, 2017.

In November 2017, mother tested positive for methamphetamine and left the program. Mother later explained that a friend had offered her an e-cigarette and only later disclosed that it was laced with

methamphetamine. Mother claimed she did not intend to relapse and made a poor choice taking the e-cigarette. Afterwards, she had nine negative drug tests, with one no show. Mother stated the no show was because she had substance abuse class and work and so was unable to test.

The Department opposed mother's section 388 petition, noting that mother had prior unsuccessful attempts to complete a treatment program and had not shown consistency in her efforts to achieve sobriety. J.A. was thriving and emotionally bonded with her prospective adoptive parents, with whom she had been living since July 2016. The prospective adoptive parents were ready to move forward with the plan of adoption. Therefore, the Department recommended denying mother's section 388 petition and proceeding to the section 366.26 hearing.

In December 2017, mother enrolled in an outpatient drug program. The program reported that mother had a positive attitude, good attendance, and did not show signs of relapse. Mother was subject to random urinalysis tests. Between December 29, 2017 and January 26, 2018, mother was tested seven times, with two no-shows. Later, she was tested eight times, with seven negative tests, and one positive test for methamphetamine on April 23, 2018.

Mother continued to have two-hour monitored visits with J.A., but there is very little information about the visits in the record. Mother's attorney sent an investigator to document two of mother's visits in April 2018. Both visits went well. The first visit took place at a McDonalds and

then the mall. Mother brought workbooks and press-on nails for J.A.; J.A. was happy to see mother, running to her yelling “mommy!” and jumping up to give her a hug and several kisses. The two ate, worked together on J.A.’s workbooks, and sang songs together at the restaurant, then walked to the mall to window shop. The second visit took place at a park, where mother and J.A. were able to fly a kite, fish, and play softball. The investigator observed that the mother and J.A. “are clearly bonded and mother is appropriate in her parenting during visits.”

Section 366.26 hearing

The court conducted the section 366.26 hearing on April 27, 2018. Before mother testified, counsel for J.A. and mother stipulated to four facts: (1) that J.A. knows who mother is, (2) that she loves mother, (3) that she enjoys visits with mother, and (4) she addresses mother as mom or mommy. During her testimony, mother admitted she had a history of drug and alcohol abuse and that she was currently in recovery. She had been in her current outpatient program since December 12th, and was due to graduate in May. Mother was familiar with nine of the twelve steps of the 12-step program, and was currently working on step five, making a moral inventory of herself.

Since the case began, mother had been in three inpatient drug treatment programs. In at least one, she tested positive for methamphetamine shortly before the

program ended. In her current outpatient program, she also had tested positive for methamphetamine. Attempting to explain her recent positive drug test, mother testified that someone had been smoking in her car, which caused her positive drug test.

Mother testified about the activities she did with J.A. during her weekly three-hour visits. She has a good relationship with the foster mother, and calls J.A. every night to talk and sing songs with her. She acknowledged her unmonitored visits with J.A. had ended in June 2016 after she was arrested for driving under the influence.

Mother first presented argument in support of her section 388 petition, which the court denied. Turning to argument over whether any exceptions to termination of parental rights applied, mother's counsel argued "the bonding exception should apply and parental rights should not be terminated." She argued that the bond between J.A. and her mother should not be terminated and it was in J.A.'s best interests to have mother in her life. J.A.'s counsel asked the court to terminate parental rights and free her for adoption, because there was no evidence that terminating parental rights would be detrimental to J.A. The Department joined in J.A.'s argument that parental rights should be terminated. The court found that mother met the first prong of the parental relationship exception, showing consistent visitation and contact, but had not met the burden of establishing the second prong, that the benefit of maintaining the parent-child relationship outweighed the

benefit of adoption. J.A. had been out of mother's custody for three years, and for the past two years, mother's contact had been limited, with monitored visitation taking place once a week. The court noted that it made the finding with sadness, because it was clear how much mother loved J.A.

DISCUSSION

Mother contends the trial court erred when it denied application of the parental relationship exception under section 366.26, subdivision (c)(1)(B)(i). We disagree.

Applicable law

“At a section 366.26 hearing, the juvenile court selects and implements a permanent plan for the dependent child.” (*In re Noah G.* (2016) 247 Cal.App.4th 1292, 1299 (*Noah G.*.) At that stage of the proceedings, the preferred plan is adoption. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 645 (*Breanna S.*.) “First, the court determines whether there is clear and convincing evidence the child is likely to be adopted within a reasonable time. [Citations.] Then, if the court finds by clear and convincing evidence the child is likely to be adopted, the statute mandates judicial termination of parental rights unless the parent opposing termination can demonstrate one of the enumerated statutory exceptions applies.” (*Id.* at pp. 645–646.)

The beneficial parental relationship exception under section 366.26, subdivision (c)(1)(B)(i), applies only if “[t]he court finds a compelling reason for determining that termination would be detrimental to the child” because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) In analyzing whether a parent has met his or her burden to show application of the parent-child relationship exception, the dependency court considers two prongs. The first prong examines the quantitative question of how consistently a parent has maintained visitation with the child. (*In re Grace P.* (2017) 8 Cal.App.5th 605, 612.) “[T]he second prong involves a qualitative, more nuanced analysis, and cannot be assessed by merely looking at whether an event, i.e. visitation, occurred. Rather, the second prong requires a parent to prove that the bond between the parent and child is sufficiently strong that the child would suffer detriment from its termination.” (*Id.* at p. 613.) For the beneficial parental relationship exception to apply, the parent “has the burden of proving her relationship with the children would outweigh the well-being they would gain in a permanent home with an adoptive parent.” (*Noah G.*, *supra*, 247 Cal.App.4th at p. 1300.)

The parent asserting the parental relationship exception will not meet his or her burden by showing the existence of a “friendly and loving relationship,” an emotional bond with the parent, or pleasant, even frequent,

visits. (*In re J.C.* (2014) 226 Cal.App.4th 503, 529; *In re C.F.* (2011) 193 Cal.App.4th 549, 555; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418–1419.) “A showing the child derives some benefit from the relationship is not a sufficient ground to depart from the statutory preference for adoption.” (*Breanna S.*, *supra*, 8 Cal.App.5th at p. 646.) The parent must show she occupies a parental role in the child’s life, and that “the child would suffer detriment if his or her relationship with the parent were terminated.” (*In re C.F.*, *supra*, at p. 555, see also *Breanna S.*, *supra*, at p. 646; *In re G.B.* (2014) 227 Cal.App.4th 1147, 1165.) Courts consider “[t]he age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) A court must find that the parent-child relationship “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*Id.* at p. 575.)

“Moreover ‘[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.’ [Citation.]” (*Breanna S.*, *supra*, 8 Cal.App.5th at p. 646.)

Standard of review

In reviewing challenges to a court’s decision to deny application of a statutory exception to adoption, we employ the substantial evidence or abuse of discretion standard of review, depending on the nature of the challenge. (*In re K.P.* (2012) 203 Cal.App.4th 614, 621–622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314–1315 (*Bailey J.*)). For factual determinations, such as whether a parent has shown consistent visitation and the existence of a parental relationship, we apply a substantial evidence standard of review. (*In re K.P.*, *supra*, at p. 22; *Bailey J.*, *supra*, at p. 1314.) Once the court has found adequate evidence of a parental relationship, it must determine whether termination of parental rights would be detrimental to the child as weighed against the benefits of adoption. (See *Noah G.*, *supra*, 247 Cal.App.4th at p. 1300; *Breanna S.*, *supra*, 8 Cal.App.5th at p. 647.) Because the second determination requires the court to exercise its discretion, we apply an abuse of discretion standard of review. (*In re K.P.*, *supra*, at p. 622; *Bailey J.*, *supra*, at p. 1315.) “In the dependency

context, both standards call for a high degree of appellate court deference.” (*In re J.S.* (2017) 10 Cal.App.5th 1071, 1080 [sibling relationship exception].)

The court did not abuse its discretion in finding the statutory exception inapplicable

Mother has not shown that the court abused its discretion in deciding she had not met the requirements of the parental relationship exception. To carry her burden of proof, mother must show not only a parental bond between herself and J.A., but that the detriment to J.A. caused by terminating mother’s parental rights outweighs the benefits of adoption. (See *Noah G.*, *supra*, 247 Cal.App.4th at p. 1300; *Breanna S.*, *supra*, 8 Cal.App.5th at p. 647.) Mother argues, “Minor was over two years old at the time of the section 366.26 hearing and had been bonded with mother all of her life.” The trial court recognized that mother had maintained consistent visitation with J.A., and that mother and daughter were bonded to each other. The minor looked forward to visits with mother and referred to her as “mom” or “mommy.” Mother also maintained daily telephone contact with the child. But mother only gives a partial picture, ignoring the fact that a bond between parent and child is not enough to require application of the statutory exception.

J.A. was detained and taken from mother’s custody in April 2015 when she was 18 months old. The section 366.26 hearing took place three years later, in April 2018, when

minor was four and a half years old. During those three years, minor first lived with her maternal grandmother, then two different foster families. So for two-thirds of her young life, her relationship with mother has consisted solely of weekly visits, mostly monitored or public visits. During the three years this case has been pending, as J.A. has grown from an infant to a pre-schooler, mother has cycled in and out of numerous inpatient and outpatient drug and alcohol treatment programs.

Mother's ongoing struggle with addiction offers a valid basis for a court's determination that the bond between J.A. and mother is outweighed by the benefits of stability through adoption. In *Noah G.*, *supra*, 247 Cal.App.4th at pages 1302 to 1303, the court affirmed termination of parental rights after contrasting mother's unresolved substance addiction issues (which led to the dependency case) against the facts in *In re S.B.* (2008) 164 Cal.App.4th 289, where the father had complied with every aspect of the case plan, which "evidenced complete devotion to the child's welfare." (*Noah G.*, *supra*, at p. 1302, citing *In re S.B.*, *supra*, at pp. 300–301.)

In the current case, mother took responsibility for the harm her addiction caused her children and acknowledged that she will always be working on recovery. Mother made significant progress leading up to the six-month review hearing in March 2016, and was able to have twice-weekly, eight-hour unmonitored visits with J.A. for several weeks,

until she lapsed back into drug and alcohol use, leading to a DUI arrest in June 2016.

For close to two years, mother has only had monitored two or three hour visits with J.A. She enrolled in and dropped out of at least three different drug treatment programs. Her most recent stretch of sobriety was broken with a positive test for methamphetamine, which she tried to explain was caused by her being in a car with other people who were smoking.

In contrast to the limited time spent with mother in a monitored setting, J.A. had lived for over a year with a family that was committed to adopting her and providing a loving, stable, and secure home. J.A. became closely bonded to her prospective adoptive family, including being proud and protective of a new younger foster sibling. She had established an emotional bond with her prospective adoptive parents, and adoption, not legal guardianship, would be in her best interest.

Mother argues that by giving “inadequate importance” to the benefit of maintaining minor’s bond with her mother, the court casually discarded minor’s emotional well-being and stability in favor of adoption “based on socio-economic considerations which are not legislatively or otherwise properly a part of a consideration” of the beneficial parental relationship exception. Arguing that “social engineering is inappropriate,” mother implies—without evidence—that the court favored adoption because minor’s prospective adoptive parents were socio-economically better off than mother. We

disagree that social engineering factored into the court's decision. There is no indication the lower court considered the relative socio-economic positions of mother and the prospective adoptive parents in arriving at its decision.

Lastly, mother also argues guardianship would allow J.A. to preserve her relationship with mother while still enjoying the benefits of a stable life with her foster caregivers as her legal guardians. But, given the clear and convincing evidence of the availability of an adoptive family, the statutory order of preference here requires the court to order the child placed for adoption. (§ 366.26, subds. (b)(1) & (c)(1).) Further, the court and the Department had already explored the possibility of J.A. maintaining contact with mother through an open adoption, but the record evidence, including the observations of the prospective adoptive family, support concerns about whether continued visits with mother and J.A.'s older sibling was causing J.A. confusion. Mother's claim that a guardianship is preferable is not a basis for finding an abuse of discretion in the court's decision to deny application of the parental relationship exception.

Although mother and J.A. enjoyed consistent and loving contact, including daily phone calls and weekly two-hour monitored visits, the amount of time minor has spent out of mother's custody and the absence of any evidence minor will suffer detriment if her relationship with mother is ended provide adequate support for the court's decision.

DISPOSITION

The order terminating parental rights is affirmed.

MOOR, J.

We concur:

BAKER, Acting P.J.

JASKOL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.